Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

WILLIAM N. WEBER, M.D.,
Petitioner

v.

DEPARTMENT OF VETERANS AFFAIRS AND ANTHONY J. PRINCIPI, SECRETARY OF VETERANS AFFAIRS,
Respondents

On Petition for Writ Of Certiorari
To The United States Court of
Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

Petitioner, Dr. William N. Weber, was discharged from his position as a physician with the Department of Veterans Affairs on September 13, 1999, based on a recommendation of a summary review board. Dr. Weber filed an action for judicial review of his discharge in district court.

On June 3, 2004, the district court vacated the decision of the summary review board and remanded for further action. The district court ruled "the VA's termination to be "arbitrary, capricious, and not in accordance with law." (Appendix 4) The VA did not appeal this decision.

The VA reinstated Dr. Weber effective June 3, 2004. Dr. Weber was without pay from the time of his discharge September 13, 1999 to the reinstatement on June 3, 2004.

Dr. Weber filed a new lawsuit seeking his back pay under the Back Pay Act. The district court dismissed his action under the Back Pay Act and the Administrative Procedures Act and the 9 th Circuit Court of Appeals affirmed. It is from the 9 th Circuit decision that Dr. Weber petitions for certiorari.

1. Whether the district court has jurisdiction to hear a claim under the Back Pay Act, 5 U.S.C. § 5596, from a discharged Tile 38 appointed employee of the Veterans Administration.

Table of Contents

Questions Presented for Review i

Table of Contents iii

Table of Authorities iv

Citations to Reports 1

Statement of Jurisdiction 2

Constitutional Provisions;
Statutes and Regulations 3

Statement of the Case 4

Argument 5

Table of Authorities

Cases

Alaniz v. Office of Personnel Management,
728 F.2d 1460, 1470 (Fed.Cir.1984) 8, 9
Bosco v. US,
931 F2d 879, 883, fn 3 (Fed Cir. 1991),
aff'd, 976 F.2d 710, 714 (Fed.Cir.1992) 11
Bur v. United States,
621 F.2d 415, 416 (1980) 9
Gratehouse v. United States,
206 Ct.Cl. 288, 296, 512 F.2d 1104,
1108 (1975), cert. denied, 434 U.S. 955,
98 S.Ct. 480, 54 L.Ed. 2d 313 (1977) 9
Harrison v. Veterans Admin.,
M.S.P.B.1990, 44 M.S.P.R. 594.
Merit Systems Protection 524. 10
Kerr v. National Endowment for the Arts,
726 F.2d 730, 733 (Fed.Cir.1984) 10
Romero v. United States,
38 F.3d 1204, 1211 (Fed.Cir.1994) 5, 6, 11
Ryder v. United States,
585 F.2d 482, 487-88 (Ct.Cl.1978) 9
Shaposka v. United States,
215 Ct.Cl. 34, 43, 563 F.2d
1013, 1018 (1977) 9
Summers v. United States,
227 Ct. Cl 353, 648 F2d 1324, 1327
(Ct. Cl. 1981) 9

United States v. Fausio,
484 U.S. 439, 108 S.Ct. 668, 98
L.Ed.2d 830 (1988) 10
Ward v. Brown,
22 F.3d 516, 519, 520 (2nd Cir. 1994). 4, 5, 6
Weber v. Department of Veterans Affairs,
521 F.3d 1061, 1067 (9th Cir. 2008) 5, 6, 7
Wells v. F.A.A.,
755 F.2d 804 (11th Cir.1985) 7

Rules

5 U.S.C. § 5596 ..... 4, 5, 6, 8, 10

28 U.S.C. § 1331 4

Title 38 of the United States Code 5, 6

Citations to Reports

Weber v. Department of Veterans Affairs,
521 F.3d 1061, 08 Cal. Daily Op. Serv. 3987, 2008 Daily Journal D.A.R. 4875, C.A.9 (Mont.), April 04, 2008 (NO. 06-35522)

Weber v. Department of Veterans Affairs,
512 F.3d 1178, 13 Wage & Hour Cas.2d (BNA) 371, 08 Cal. Daily Op. Serv. 493, 2008 Daily Journal D.A.R. 607, C.A.9 (Mont.), January 15, 2008 (NO. 06-35522)

Weber v. Department of Veterans Affairs and Anthony J. Principi, CV 04-46-H-SEH, United States District Court, District of Montana, Order of Dismissal, Docket No. 34.

Statement of Jurisdiction

The Amended Judgment of the Ninth Circuit was entered on April 4, 2008. The United States Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1)

Constitutional Provisions; Statutes and Regulations

5 U.S.C. § 701-706
5 U.S.C. § 5596
38 U.S.C. § 7401
38 U.S.C. § 7403(b)(1)
38 U.S.C. § 7405(a)(1)(A)
38 U.S.C.§ 7461 (c) (3)
38 U.S.C. § 7462 (f) (1)
VHA Supp, MP-5, Part II, Chapter 4 § 4.09(h)(1)
VHA Supplement, MP-5, Part II, Rule 4.06
VA Handbook 5005, Part II, Chapter 3, Subsection F(3)(d)
VH Handbook 5021, Part III, Chapter 1(1), (3)
VA Handbook 5021, Part V, Chapter 1, paragraph 8
VA Handbook 5021, Appendix A(5)

Statement of the Case

The facts have been set out above in the questions presented for review. The district court had jurisdiction over this matter, pursuant to the Back Pay Act, 5 U.S.C. § 5596. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 USC § 1331. A federal district court has jurisdiction over a judicial review and back pay case under the federal question statute, 28 USC § 1331. *Ward v. Brown*, 22 F.3d 516, 519 (2nd Cir. 1994).

Argument

The Ninth Circuit in denying jurisdiction under the Back Pay Act has created a direct conflict between circuits regarding jurisdiction for determination of claims under The Back Pay Act, 5 U.S.C. § 5596. *See*, *Weber v. Department of Veterans Affairs,* 521 F.3d 1061, 1067 (9th Cir. 2008, Appendix 1) *and Ward v. Brown*, 22 F.3d 516, 520 (2d Cir. 1994, Appendix 5) and *Romero v. United States*, 38 F.3d 1204, 1211 (Fed.Cir.1994).

The Ninth Circuit holds that a Physician appointed under Title 38 of the United States Code cannot seek damages or review of summary review board decisions under the Back Pay Act. The Ninth Circuit also holds that the district court is not an "appropriate authority" to determine whether a VA employee was subjected to an unjustified personnel action. *Weber, supra.*

The Second Circuit holds that the Back Pay Act provides an "explicit waiver of sovereign immunity" for a nurse appointed under Title 38 of the United States Code. *Ward, supra at* 520.

The Federal Circuit holds that a district court is an "appropriate authority" under the Back Pay Act to review an agency determination regarding matters not covered by the Civil Service Relief Act. *Romero, supra*, at 1211.

Dr. Weber was appointed under Title 38 and

was discharged based on a recommendation of a summary review board. After receiving a favorable decision from the district court holding that the discharge was not in accord with law Dr. Weber filed a Back Pay Act claim. *Weber*, 521 F3d at 1064-1065. The Ninth Circuit held that the district court did not have jurisdiction under the Back Pay Act.

Mr. Ward was a nurse with the VA, appointed under Title 38, who was discharged after a review board recommend his discharge. He sued under the Back Pay Act for damages. The Second Circuit held that the Back Pay Act affords the district court jurisdiction over the claim. *Ward, supra.*

"The Back Pay Act is the means by which appointed employees subject to unjustified personnel action are given a cause of action against the United States." *Ward, at* 520. The Back Pay Act provides an explicit waiver of sovereign immunity. *Id.* The Act provides a federal government employee is entitled to back pay if "found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay ... of the employee." 5 U.S.C. § 5596(b)(1) and *Ward, at* 520.

Dr. Weber's claim for back pay falls within the terms of the Back Pay Act. The district court found that a federal government agency, the VA, subjected Dr. Weber to an unwarranted personnel action that

resulted in the withdrawal of pay. According to the Federal Circuit, but not the Ninth Circuit, the district court is an "appropriate authority" to make Back Pay Act rulings. *Romero v. United States*, 38 F.3d 1204, 1211 (Fed.Cir.1994), (holding that a district court is an "appropriate authority" under the Back Pay Act to review an agency determination regarding matters not covered by the Civil Service Relief Act.); *Weber, at*, 1067.

The Back Pay Act provides Dr. Weber the necessary waver of sovereign immunity to have his case heard in federal district court, and as such, the district court had jurisdiction to hear this case. The split between the circuits should be resolved.

The purpose of Back Pay Act is to put an employee who was the victim of an unjustified or unwarranted personnel action in the same position as he would have been had the erroneous action not occurred. *Wells v. F.A.A.* 755 F.2d 804 (11th Cir.1985) The Act provides:

> An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has

> resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee–
>
> (i) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--
>
> (ii) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and
>
> (iii) reasonable attorney fees related to the personnel action.

5 U.S.C. § 5596(b)(1). Dr. Weber seeks all compensation permitted under the Back Pay Act.

The VA's failure to follow its own rules is an "unwarranted personnel action" and Dr. Weber is entitled to back pay. The district court ruled that the VA violated its own rules when it discharged Dr. Weber in September, 1999, and ruled the agency action arbitrary, capricious, and not in accordance with law. (See order and judgment in CV 00-10-H-SEH). An "unwarranted personnel action" under the Back Pay Act, 5, U.S.C. § 5596 may result from errors of procedure, not simply those of substance. *Alaniz v. Office of Personnel Management*,

728 F.2d 1460, 1470 (Fed.Cir.1984).

In general, where adverse actions are taken by agencies without providing adverse action procedures, the action constitutes an "unjustified or unwarranted personnel action" within the meaning of the Back Pay Act, and entitles the employee to back pay. *Summers v. United States*, 227 Ct. Cl 353, 648 F2d 1324, 1327 (Ct. Cl. 1981); *Bur v. United States*, 621 F.2d 415, 416 (1980); *Shaposka v. United States*, 215 Ct.Cl. 34, 43, 563 F.2d 1013, 1018 (1977); *Gratehouse v. United States*, 206 Ct.Cl. 288, 296, 512 F.2d 1104, 1108 (1975), cert. denied, 434 U.S. 955, 98 S.Ct. 480, 54 L.Ed.2d 313 (1977). This is so because of the harmful procedural error and follows whether or not the grounds for the adverse action would be sustained on the merits. *Summers, supra*, at 1327; *Shaposka v. United States*, supra, 215 Ct.Cl. at 43, 563 F.2d at 1018; *Gratehouse v. United States, supra*, 206 Ct.Cl. at 296 n.3, 512 F.2d at 1108 n.3.

Where there has been a serious procedural defect in the prescribed events leading to the discharge of a Government employee, the employee may be entitled to the continued benefits of his employment until he has been terminated in proper fashion. *Ryder v. United States*, 585 F.2d 482, 487-88 (Ct.Cl.1978); *Shaposka v. United States*, 563 F.2d 1013, 1018 (Ct.Cl.1977). Dr. Weber is entitled to a decision granting him back pay based on the district court's judicial review decision that the VA did not discharge him pursuant to their own rules.

When the district court vacated the summary review board decision, Dr. Weber was reinstated in the same capacity he held as of September 13, 1999. Upon cancellation of unwarranted personnel action an agency is required to restore employee as nearly as possible to status quo ante; thus, employee is entitled to receive whatever rights and/or benefits he would have had if agency's action had not occurred. *Harrison v. Veterans Admin.*, M.S.P.B.1990, 44 M.S.P.R. 594. Merit Systems Protection 524; 5 U.S.C. § 5596, see also, *Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed.Cir.1984).

United States v. Fausto, 484 U.S. 439, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988), does not preclude Dr. Weber's Back Pay Act claim for the unwarranted personnel actions of the VA. Cases cited by Dr. Weber holding that an agencies failure to follow its own rules subjects an agency to back pay act claims due to unwarranted personnel actions, are not abrogated by Fausto. The holding in Fausto did not state that a failure to follow agency rules was not an unwarranted personnel action. Rather, Fausto held that those employees governed by the Civil Service Reform Act were limited in their avenues of appeal to the Court of Claims for the underlying personnel decision. *Fausto, supra*, at 4 U.S. 454.

Despite the ruling of the Ninth Circuit, nothing in Fausto bars Dr. Weber's request for relief in this case. Dr. Weber is not seeking relief from the Court of Claims and the Civil Service Reform Act does not apply to Dr. Weber. In addition, the Civil Service

Reform Act in question in Fausto has been amended to permit review for nonpreference eligible members of the excepted service. See, *Bosco v. US*, 931 F2d 879, 883, fn 3 (Fed Cir. 1991), aff'd, 976 F.2d 710, 714 (Fed.Cir.1992).

The court in Bosco, in holding that the Court of Claims did have jurisdiction to review an employment decision and award back pay pursuant to the Back Pay Act stated:

"The Supreme Court did not rule that the CSRA provided the only means of judicial review of any actions affecting federal employees, but rather that it was the only means of review as to the types of adverse personnel action specifically covered by the CSRA."

Id. See Romero v. United States, 38 F.3d 1204, 1211 (Fed.Cir.1994), holding that a district court is an "appropriate authority" under the Back Pay Act to review an agency determination regarding matters not covered by the Civil Service Relief Act.

Just as in Bosco and Romero, Dr. Weber is not covered at all by the Civil Service Relief Act. Fausto does not bar Dr. Weber's Back Pay Act Claim and the district court is an "appropriate authority" under the Back Pay Act. The United States Supreme Court should address the dichotomy between *Weber*, *Ward* and *Romero* and clarify this area of law.

DATED this 3rd day of July, 2008.

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